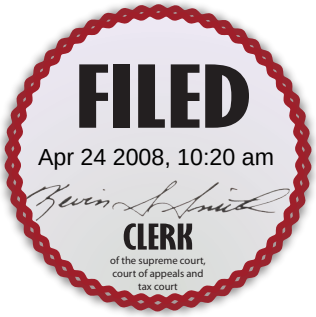

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IN THE
COURT OF APPEALS OF INDIANA

LESLIE STONE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0711-CR-985
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Fredrick R. Spencer, Judge
Cause No. 48C01-0209-FB-280

April 24, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Leslie Stone ("Stone") appeals his convictions and sentences for Resisting Law Enforcement, as a Class D felony,[1] Criminal Recklessness, as a Class D felony,[2] Criminal Confinement, as a Class B felony,[3] and Battery Resulting in Serious Bodily Injury, a Class C felony.[4] We affirm in part, reverse in part, and remand with instructions.

Issues

Stone raises the following issues:

I. Whether the prosecutor committed misconduct in closing argument;

II. Whether the same injury was improperly used to enhance two convictions; and

III. Whether Stone's sentences are inappropriate.

Facts and Procedural History[5]

Stone and Cindy McGaughy ("McGaughy") had been dating for approximately one year. On September 4, 2002, Stone had agreed to pick up one of McGaughy's two children from school and watch the two children while McGaughy worked a double shift. The children were ages four and twelve. While still at work, McGaughy learned that Stone was

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[1] Ind. Code § 35-44-3-3(b).
[2] Ind. Code § 35-42-2-2(c)(2).
[3] Ind. Code § 35-42-3-3(b)(1).
[4] Ind. Code § 35-42-2-1(a)(3).
[5] A copy of the pre-sentence investigation report on white paper is included within the appellant's appendix. We remind the parties that Ind. Appellate Rule 9(J) requires that "[d]ocuments and information excluded from public access pursuant to Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G)." Ind. Administrative Rule (G)(1)(b)(viii) requires that "[a]ll pre-sentence reports pursuant to Ind.Code § 35-38-1-13" are "excluded from public access" and "confidential." The inclusion of the report on white paper in the appellant's appendix is contrary to Trial Rule 5(G) that states in pertinent part: "Every document filed in a case shall separately identify information excluded from public access pursuant to Admin. R. 9(G)(1) as follows: (1) Whole documents that are excluded from public access pursuant to Administrative

not watching the children, who had been found alone at McGaughy's home by a neighbor.

The next morning, McGaughy was still upset with Stone and drove to the apartment of Stone's uncle to retrieve her house keys from Stone. McGaughy had her four-year-old daughter with her. When McGaughy told Stone that she wanted her keys back, he told her that they were in his uncle's car. McGaughy retrieved the keys and proceeded back to her van, entered it and started the ignition.

By this time, Stone was standing at the driver's side window and told McGaughy that he would be home later. McGaughy said that she did not want to be together any more and that he needed to come pick up his belongings from her home. As McGaughy put the van into reverse, Stone started punching her in the face. Stone unfastened her seatbelt, pulled her from the van, threw her to the ground and continued punching her. At one point, McGaughy was able to break free from Stone and started to run, screaming for help. Stone shouted after her that she should come back or else she would have to try to find her daughter. When she saw Stone getting into the van, McGaughy returned, and Stone resumed hitting her despite the screams of McGaughy's daughter.

Christine Lacy ("Lacy") was riding in a car driven by her husband and observed Stone hitting McGaughy. After requesting her husband to stop and calling the police, Lacy approached Stone and McGaughy and yelled at Stone to "get off of her." Trial Transcript at 47. When Stone ignored Lacy, she told him that she had called the police. Unphased, Stone continued punching McGaughy until he heard the police sirens. Stone fled by car.

Rule 9(G)(1) shall be tendered on light green paper or have a light green coversheet attached to the document, marked 'Not for Public Access' or 'Confidential.'"

McGaughy was transported to the local hospital, received treatment and spoke with police as well as a victim's advocate, Christy Jones ("Jones"). Jones stayed with McGaughy's daughter in the hospital room while McGaughy was taken elsewhere in the hospital for x-rays. While McGaughy was out of the room, Stone walked in and asked the whereabouts of McGaughy. Jones replied that she had stepped out for some x-rays, and she directed Stone down the hallway. Once Stone left, Jones called the police.

As McGaughy exited the x-ray room, she turned and saw Stone. She began to scream and ran away from him. Stone left the hospital.

Stone was maneuvering his vehicle through the hospital's parking lot when Officer Steve Ohlheiser arrived on the scene with his squad car's emergency lights activated. Stone stopped his car but refused to turn off his car or show Officer Ohlheiser his hands. Stone then put his car into gear and exited the parking lot. Officer Susan Hardin testified that when she came out of the hospital she saw a police car with a policeman talking to a man in a blue Toyota. Officer Hardin said that the Toyota pulled out towards the entrance near her, so she stepped out in the roadway and held her hand up. Despite Officer Hardin's gesture, Stone pulled out of the parking lot. Officer Ohlheiser drove his squad car out a different exit and pursued Stone's car. During the pursuit, Stone drove at speeds in excess of seventy miles per hour in areas where the speed limit was thirty miles per hour. At one point, Stone drove his car past utility trucks parked along a road in such a manner that one of the utility workers had to leap out of the way. Stone also crossed a four-way-stop intersection without stopping or reducing his speed. The police officers discontinued the pursuit due to safety concerns.

Stone was eventually apprehended.

McGaughy suffered a broken nose and ruptured tear ducts from the beating, requiring surgical repair. Due to her injuries, McGaughy missed almost three months of work, and the pain from her injuries did not subside for six months.

On September 27, 2002, the State charged Stone with Resisting Law Enforcement, as a Class D felony, Criminal Recklessness, as a Class D felony, Criminal Confinement, as a Class B felony, and Battery Resulting in Serious Bodily Injury, a Class C felony. After the State presented its case to the jury, Stone rested, not presenting any evidence. The jury found Stone guilty as charged. The trial court sentenced him to eighteen months for Counts I and II, nine years for Count III, and three years for Count IV. Counts I and II were ordered served concurrent with each other but consecutive to Counts III and IV. Counts III and IV were also ordered to be served concurrent with each other but consecutive to the other counts.

Stone now appeals.

Discussion and Decision

I. Prosecutorial Misconduct

Stone contends that the prosecutor committed misconduct in making various comments in his closing argument. Stone acknowledges that his trial counsel did not contemporaneously object during the State's closing argument, thus framing his argument in terms of fundamental error.

A party's failure to present a contemporaneous trial objection contending

prosecutorial misconduct precludes appellate review of the claim. Booher v. State, 773 N.E.2d 814, 817 (Ind. 2002). However, such default may be avoided if the alleged misconduct amounts to fundamental error. Id. To prevail on his claim, the defendant must establish not only the grounds for prosecutorial misconduct but also the additional grounds for fundamental error. Id. at 818. In reviewing a claim of prosecutorial misconduct, a court determines: (1) whether the prosecutor engaged in misconduct, and if so, (2) whether the misconduct had a probable persuasive effect on the jury. Ritchie v. State, 809 N.E.2d 258, 268 (Ind. 2004). Though normally referred to as "grave peril," a claim of improper argument to the jury is measured by the probable persuasive effect of any misconduct on the jury's decision and whether there were repeated occurrences of misconduct, which would evidence a deliberate attempt to improperly prejudice the defendant. Id. at 269. For a claim of prosecutorial misconduct to rise to the level of fundamental error, the defendant must also demonstrate that the misconduct made a fair trial impossible or constitutes clearly blatant violations of basic and elementary principles of due process and presents an undeniable and substantial potential for harm. Booher, 773 N.E.2d at 817.

Stone argues that the prosecutor committed misconduct that rises to the level of fundamental error in his comments that were not supported by evidence in the record, improperly played upon the fears of the jurors, and could have been interpreted as references to Stone's failure to testify. We address each in turn.

A. Unsupported References

Stone contends that the prosecutor's references to case law and anecdotes concerning

his personal experiences were improper because the record did not support them. Regarding the prosecutor's references to case law, it is proper for counsel to argue both law and facts in a closing statement. Nelson v. State, 792 N.E.2d 588, 593 (Ind. Ct. App. 2003), trans. denied. In fact, our Supreme Court has held that reading from prior case law decisions to the jury is proper in final argument so long as it is clear that the prosecutor is reading or referring to a separate case. Hernandez v. State, 439 N.E.2d 625, 630 (Ind. 1982).

Second, Stone contends that it was fundamental error for the prosecutor to use personal anecdotes during his closing argument because they were not based on evidence in the record. In final arguments, a prosecutor can "state and discuss the evidence and reasonable inferences that can be derived therefrom so long as there is no implication of personal knowledge that is independent of the evidence." Hobson v. State, 675 N.E.2d 1090, 1096 (Ind. 1996) (quoting Kappos v. State, 577 N.E.2d 974, 977 (Ind. Ct. App. 1991), trans. denied). Furthermore, statements of opinion are not prohibited. Hughes v. State, 508 N.E.2d 1289, 1303 (Ind. Ct. App. 1987), trans. denied.

The first comment Stone objects to referred to how one reacts to the end of a romantic relationship:

> Now we've all been involved in relationships where somebody tells us, "Pat, I'm done. You and I are not compatible. You and I are not made to be together." Or maybe I've made some faux pas or some stupid thing that has upset the woman and she says we're done. I'm here to tell you that the way I react is not to beat the you know what out of the woman. I move on. I say it was great knowing you or you know I might even of had some words with her. But I didn't come down out of that apartment, stop at the door as she's putting the van into gear to get away saying you're not gonna come around again tonight because we're through and then reach through that window and bust her nose. Didn't do that. Didn't do that. Most of us I think wouldn't do that.

Tr. at 186.

The second comment about which Stone complains involves the prosecutor recounting his personal experience concerning the delay in experiencing pain from an accident:

> Again I have to stress this. Dr. Milligan said that the E.R. docs don't always catch it or words to that affect. Some doctors don't always catch it. You know, you go in from a serious automobile accident sometimes where you've been banged up like crazy and you don't feel bad until the next day. Everybody knows that. I had it happen to me the night before trial in this court and I ended up with a bruised kidney, but I . . . it wasn't until the day after the accident that I dragged myself back to the hospital. That happens.

Tr. at 201-02. These comments were in response to defense counsel's comments regarding the evidence that McGaughy did not seemed distressed in the emergency room and that the E.R. doctors did not report any serious injuries, implying that McGaughy's injuries were not serious bodily injuries.

"Prosecutors are entitled to respond to allegations and inferences raised by the defense even if the prosecutor's response would otherwise be objectionable." Cooper v. State, 854 N.E.2d 831, 836 (Ind. 2006). At least one of the prosecutor's comments was clearly intended to respond to the characterization of the evidence by the defense counsel by relating to a common experience. Defense counsel even stated to the jury in his closing remarks that "you [the jury] must examine things as you know them to be from each and every one of your life experiences." Tr. at 199. Although a prosecutor is entitled to respond to the inferences drawn by defense counsel during his closing arguments, a prosecutor still must confine his argument to the evidence in record and the inferences that can be drawn therefrom. It was error for the prosecutor to incorporate these personal anecdotes into his closing argument, as

they are not based on the evidence presented.

Stone did not lodge a contemporaneous objection and must prove that these comments by the prosecutor rise to the level of fundamental error. An error is of a fundamental nature if it made a fair trial impossible or constitutes clearly blatant violations of basic and elementary principles of due process and presents an undeniable and substantial potential for harm. Booher, 773 N.E.2d at 817. While it was error and certainly not condoned, nevertheless, we do not believe that these comments made a fair trial impossible or presented an undeniable and substantial potential for harm under these circumstances.

B. Comments Playing on Fear

Next, Stone asserts that the prosecutor improperly played upon the fears of the jurors with the following comments:

> He ran. And then we have the offense that unfolded in the parking lot and down Madison Avenue to Cross Street and Indiana Avenue. Blowing the stop sign. Going through a utility workers area. Nearly hitting somebody. It shows you what kind of person he is. He really literally has no regard for anybody. He has no regard for the woman that he beat up and broke her nose. He has no regard for you or I if we happened to be going through an intersection. He has no regard for those guys who are the guys that keep our phone service in place. He has no regard for anybody, ladies and gentlemen.

Tr. at 194. We do not find Stone's argument availing. "It is misconduct to phrase final argument in a manner calculated to inflame the passions or prejudices of the jury." Gasaway v. State, 547 N.E.2d 898, 901 (Ind. Ct. App. 1989), trans. denied. The danger inherent in inflammatory conduct is that the jury, because it is fearful, angry, or controlled by other emotions, will find guilt no matter what the evidence of the case may be. Id. at 901-02. And, although these comments were directed toward the element of recklessness, it may have been

a better choice to omit the reference to the jury in stating that Stone had no regard for anyone, it does not rise to the level of a comment calculated to inflame the passions of the jury to find guilt no matter what the evidence of the case may be.

C. Inferences to Failure to Testify

Finally, Stone argues that the prosecutor committed misconduct by making inferences that the jury could have interpreted as comment on Stone's failure to testify. Essentially, Stone asserts that these comments violated his Fifth Amendment right to remain silent. "The Fifth Amendment by its terms prevents a person from being 'compelled in any criminal case to be a witness against himself.'" Mitchell v. United States, 526 U.S. 314, 327 (1999). Although direct and indirect inferences that can be drawn from the defendant's failure to testify are not necessarily improper, the defendant's privilege against compulsory self-incrimination is violated when a prosecutor makes a statement that a jury may reasonably interpret as an invitation to draw an adverse inference from the defendant's silence. Schmidt v. State, 816 N.E.2d 925, 944 (Ind. Ct. App. 2004), trans. denied. The defendant has the burden of proving that a remark or remarks by the prosecutor penalized his exercise of the right to remain silent. Moore v. State, 669 N.E.2d 733, 738 (Ind. 1996).

The majority of the excerpts from the prosecutor's closing statement about which Stone complains are comments regarding the lack of evidence presented by the defense for the particular charge, thus making the evidence uncontroverted. Generally, statements made by the State as to the uncontradicted nature of the State's evidence do not violate a defendant's Fifth Amendment rights. Martinez v. State, 549 N.E.2d 1026, 1028 (Ind. 1990).

Comment on the lack of evidence presented by the defense concerning otherwise incriminating evidence against him is proper as long as the State focuses on the absence of any evidence to contradict the State's evidence and not on the accused's failure to testify. Id. However, the State may not comment on the absence of contradictory evidence where the defendant alone could have contradicted the State's case. Haycraft v. State, 760 N.E.2d 203, 208 (Ind. Ct. App. 2001), trans. denied.

Here, in summarizing the evidence on each of the four charges, the prosecutor repeatedly characterized the State's evidence and case as uncontroverted:

> Everything that Sergeant Ohlheiser said is without controversy. There's not . . . It's not . . . There was no evidence at all presented that was contrary to what he said. There was no cross examination whatsoever.

Tr. at 177.

> The evidence which is I'll say uncontroverted. The big word is maybe unrebutted, but uncontroverted is that the defendant is guilty as charged, exactly as I read to you of fleeing or resisting law enforcement, a class D felony.

Tr. at 178.

> We heard Officer Ohlheiser's uncontroverted testimony that there was Ameritech vehicles that were parked over to one side . . .

Tr. at 179.

> The evidence from Sergeant Ohlheiser, no cross examination, is uncontroverted, unrebutted. There's nothing that is anything but overwhelming evidence as to the first few counts.

Tr. at 180.

> [McGaughy] also testified that she eventually had escaped and then the defendant uses the fact that this four-year-old little girl is in a car seat in the

> back of that van and says you better get back over here (to take a beating) because I'm gonna take off with your daughter and you're not gonna find her. Did you hear any evidence to the contrary with respect to that? No, you didn't.

Tr. at 184.

> Again, the uncontroverted, overwhelming evidence that came from that seat from Sergeant Ohlheiser makes the defendant guilty of that particular charge [resisting law enforcement].

Tr. at. 187.

> There's no evidence to the contrary that he held her and beat her. There's no evidence to the contrary you heard it on the video that he dragged her over to the car and continued to hit her and there's no evidence to the contrary that once she had gotten away from him, that by threatening to take her daughter and run away with her.

Tr. at 193.

> You heard nothing from this chair over here that is to the contrary that I have proved each and every charge beyond a reasonable doubt.

Tr. at. 194-95. Although it is not specified in the record, based on earlier comments in the closing argument it is a reasonable inference that "that chair" refers to the witness chair.

The trial here involved evidence on four charges that occurred at different times throughout one day. The State presented the testimony of McGaughy, the victim, and Lacy, the rescuer, as well as McGaughy's medical records to support the battery charge. As to the charge of resisting law enforcement, Officers Ohlheiser and Hardin testified to Stone ignoring demands by both officers to stop. Because there was more than one witness to these crimes other than Stone, Stone was not the only person who could have contradicted the State's case. Therefore, the prosecutor could point out that the State's case was uncontroverted in summarizing the evidence presented so long as it was focused on the

absence of any contradictory evidence and not the defendant's failure to testify. However for the other two charges, the evidence presented by the State for the commission of each alleged crime hinges on the testimony of one witness.

As to the charge of criminal confinement, McGaughy testified that after she was able to escape the reach of Stone that he threatened the safety of her daughter, causing her to return out of fear. McGaughy's testimony was the only evidence presented by the State supporting the criminal confinement charge. From McGaughy's testimony of the circumstances, there is no indication that any other readily identifiable person[6] was present except for McGaughy's four-year-old daughter when Stone made this threat. The State does not make an argument to the contrary. Moreover, the prosecutor in his closing argument commented that he "[c]ouldn't call her four-year-old daughter," presumably implying that it was his opinion that the little girl was not a competent witness to testify regarding the incident. Tr. at 193. This would make McGaughy and Stone the only two competent witnesses to the circumstances of the confinement charge. Therefore, Stone would be the only person who could have contradicted the State's case on the criminal confinement charge. Because Stone was the only other witness, the prosecutor was not permitted to characterize the evidence as uncontroverted or that there was no evidence presented to the contrary. Thus, the prosecutor's two comments[7] contrary to this prohibition constitute error

[6] McGaughy testified that she did see other people "around" when she was being beaten by Stone. However, there is no shred of detail as to who these people were or how their presence would give credence to McGaughy's testimony. Therefore, we do not include these unidentified "other people" in our analysis as to whether any person other than the defendant could contradict the State's evidence.

as improper statement that a jury may reasonably interpret as an invitation to draw an adverse inference from the defendant's silence.

For the charge of criminal recklessness, Officer Ohlheiser testified that during his pursuit of Stone from the hospital that Stone drove at speeds in excess of seventy miles per hour and that Stone narrowly missed hitting a utility worker standing near the edge of the road. The State's evidence on this charge was solely based on Officer Ohlheiser's testimony. There is no indication from his testimony that any other police officer participated in the car chase. Although there may have been members of the general public who witnessed the chase, there are no readily identifiable witnesses to confirm or deny that Stone drove in excess of seventy miles per hour and almost hit a man with his car. The State apparently chose not to investigate the identity of the utility worker and utilize him as a witness to this charge. Thus, the only apparent person capable of contradicting the State's case on the charge of criminal recklessness was Stone. Again, the prosecutor was then prohibited from commenting that the State's case was uncontroverted. Not only did the prosecutor remark that the evidence from Officer Ohlheiser was uncontroverted and unrebutted, but he also expressed that "[t]here's nothing that is anything but overwhelming evidence as to the first few counts." Tr. 180. We conclude that it was error for the prosecutor to make such a comment.

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[7] "[McGaughy] also testified that she eventually had escaped and then the defendant uses the fact that this four-year-old little girl is in a car seat in the back of that van and says you better get back over here (to take a beating) because I'm gonna take off with your daughter and you're not gonna find her. Did you hear any evidence to the contrary with respect to that? No, you didn't." Tr. at 184.

"[T]here's no evidence to the contrary that once she had gotten away from him, that by threatening to take her daughter and run away with her." Tr. at 193.

In Rowley v. State, our Supreme Court reversed a conviction for burglary and granted a new trial based on the prosecutor's comment that the State's case was uncontroverted where only the defendant was in the position to contradict the State's case. Rowley v. State, 259, Ind. 209, 285 N.E.2d 646 (1972). According to an agreed statement for the appeal, "[the prosecutor] had argued for sometime on what evidence there was concerning the guilt of the defendant and then made the remark that there had not been one bit of evidence from the witness stand that indicated that the defendant was not guilty." Id. at 647. In concluding that this comment amounted to reversible error, the Rowley Court explained:

> There is clearly no other inference that could be drawn in this case other than the inference that the prosecutor was speaking of the appellant. The prosecution relied primarily on the testimony of an accomplice who admitted entering the house in question with the appellant and taking several items including watches, rings and a small amount of money. Other than another young boy who testified for the State that he had driven the two to the house in question, the only person in a position to contradict the State's case was the appellant.
>
> By the entry of his plea of not guilty the appellant indicated his intention to contradict all of the relevant State's evidence. By stating that 'there had not been one bit of evidence from the witness stand that indicated the defendant was not guilty', the prosecutor used language of such a character 'that the jury would naturally and necessarily take it as a comment on the failure of the accused to testify?' United States ex rel. Leak v. Follette, supra. Surely, the evidence from the State's witness would not be expected to indicate the innocence of the appellant.

Id. at 648. The Court also noted that the comment warranted reversal despite the provision of the jury instruction directing the jury to not consider the defendant's failure to testify in its decision, because such an instruction at the end of a trial cannot take the place of a prompt admonishment. Id. at 649.

We are faced with circumstances where the prosecutor made improper remarks as to two of the four charges, infringing on the defendant's Fifth Amendment right to remain silent. In accord with Rowley, we conclude that these comments constitute error as to the charges for criminal confinement and criminal recklessness. Our analysis does not end there. Unlike Rowley, Stone did not lodge a contemporaneous objection and must prove that these comments by the prosecutor rise to the level of fundamental error. An error is of a fundamental nature if it made a fair trial impossible or constitutes clearly blatant violations of basic and elementary principles of due process and presents an undeniable and substantial potential for harm. Booher, 773 N.E.2d at 817. "The mere fact that an alleged error implicates constitutional issues does not establish fundamental error has occurred." Schmidt v. State, 816 N.E.2d 925, 945 (Ind. Ct. App. 2004) (citing Wilson v. State, 514 N.E.2d 282, 284 (Ind. 1987)).

It is clear from the cadence of the prosecutor's "uncontroverted evidence" comments that it was essentially the theme of the prosecutor's closing statement. However, these comments were only improper as to two of the counts. We do not believe that these few indirect comments made a fair trial impossible or presented an undeniable and substantial potential for harm under these circumstances.

II. Improper Enhancement

Stone asserts and the State concedes that the same bodily injury, McGaughy's broken nose, was used to enhance both the count for confinement and the count of battery based on serious bodily injury. Stone is correct that this is in contravention of the rules of statutory

construction and common law that constitute one aspect of Indiana's double jeopardy jurisprudence. See Strong v. State, 870 N.E.2d 442, 443 (Ind. 2007) ("[W]here one conviction is elevated to a Class A felony based on the same bodily injury that forms the basis of [another] conviction, the two cannot stand.") To remedy this violation, a court may reduce the sentencing classification on one of the offending convictions. Id. We therefore remand to the trial court with instructions to reduce Stone's conviction for Battery Resulting in Serious Bodily Injury, as a Class C felony, to Battery, as a Class D felony. Because it is clear from the record that the trial court took this possible issue into consideration in sentencing, no revision of the battery sentence is needed.

III. Appropriateness of Sentences

At the outset, we observe that Stone committed and originally was charged with these crimes in 2002 but was not convicted and sentenced until 2007. In 2005, the legislature replaced the prior sentencing statutes, which provided a "presumptive" sentence for each class of felony, with new statutes providing for an "advisory" sentence. Because "the sentencing statute in effect at the time a crime is committed governs the sentence for that crime," we address our review of Stone's sentence in terms of the presumptive sentencing scheme. Gutermuth v. State, 868 N.E.2d 427, 432 n.4 (Ind. 2007).

Stone contends that the sentences imposed by the trial court are inappropriate under Indiana Appellate Rule 7(B). Our Supreme Court recently reviewed the standard by which appellate courts independently review criminal sentences:

> Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana

> Constitution authorize independent appellate review and revision of a sentence through Indiana Appellate Rule 7(B), which provides that a court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender. The burden is on the defendant to persuade us that his sentence is inappropriate.

Reid v. State, 876 N.E.2d 1114, 1116 (Ind. 2007) (internal quotation and citations omitted). Stone was convicted of three[8] Class D felonies and a Class B felony. The range of possible sentences for a Class D felony is between a minimum of six months and a maximum of three years with a presumptive sentence of one and one-half years. For a Class B felony, the range is between six and twenty years with a presumptive of ten years. The trial court sentenced Stone to the presumptive sentence of one and one-half years for two of the Class D felonies, the maximum of three years for the battery charge to be revised to a Class D felony, and to one year less than the presumptive, nine years for the Class B felony.

The "nature of the offense" portion of the 7(B) standard speaks to the statutory presumptive sentence for the class of crimes to which the offense belongs. See Williams v. State, 782 N.E.2d 1039, 1051 (Ind. Ct. App. 2003), trans. denied. In other words, the presumptive sentence is intended to be the starting point for the court's consideration of the appropriate sentence for the particular crimes committed. Id. The "character of the offender" portion of the standard refers to the general sentencing considerations and the relevant aggravating and mitigating circumstances. Id. Therefore, when the trial court imposes the presumptive sentence, the defendant carries a heavy burden in persuading us that his or her sentence is inappropriate. McKinney v. State, 873 N.E.2d 630, 647 (Ind. Ct. App.

2007), trans. denied.

As for the nature of the offenses, Stone reacted to the ending of a romantic relationship by repeatedly punching McGaughy in the face while her four-year-old daughter looked on, screaming. When McGaughy had the opportunity to escape, Stone threatened the safety of McGaughy's child to coax her back so that he could continue to hit her. Even after a passerby tried to intervene, Stone only ceased his succession of punches when he heard police sirens approaching. Stone continued to pursue McGaughy by arriving at the local hospital, locating McGaughy's room and asking her whereabouts. When he realized police were nearby, he left the hospital and initially yielded to the commands of a police officer but eventually drove off. As the police pursued him, Stone reached speeds of over seventy miles per hour, over twice the speed limit in that area of town. Stone also ignored a stop sign and endangered utility workers working alongside the road. McGaughy suffered a broken nose and ruptured tear ducts from the incident, requiring surgical repair.

As to his character, Stone served in the military for ten years and worked at the Department of Defense for eight years. As for his criminal history, Stone does not have any felonies and only had one Class A misdemeanor charge for invasion of privacy pending at the time of sentencing. The trial court noted that Stone demonstrated a lack remorse for his actions.

Based on the nature of the offenses and the character of the offender, Stone has not persuaded us that he deserved less than the presumptive sentence for the two Class D felonies, less than the maximum for the revised Class D felony of battery, and more than one

[8] The battery conviction will be revised to a Class D felony upon remand.

year less than the presumptive for the Class B felony.

Conclusion

In sum, the prosecutor erroneously used personal anecdotes and commented on certain uncontroverted evidence during closing argument although the comments did not make a fair trial impossible or present an undeniable and substantial potential for harm. The trial court did err by using the same bodily injury to enhance the convictions for confinement and battery. We remand the case to the trial court with instructions to reduce the battery conviction to a Class D felony and impose sentence on that conviction. Finally, we conclude that Stone's sentences for his convictions are appropriate.

Affirmed in part, reversed in part and remanded with instructions.

NAJAM, J., and CRONE, J., concur.